United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1438

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B P/S

Docket No. 76-1438

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES MELVIN GREEN,

Defendant-Appellant,

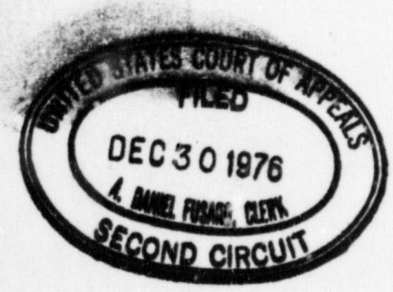
and

DEBRA FENNELL GREEN,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT



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This reply brief is submitted on behalf of defendant-appellant James Melvin Green in order to respond to the most important of the new contentions advanced in the Government's brief on the present appeal.

THE FACTS

The Statement of Facts in the Government's brief (Gov't Br. 3-7), and the references to the facts appearing elsewhere in the Government's brief, are unfortunately incomplete and highly selective, overstating the evidence favorable to the Government and omitting important evidence unfavorable to the Government. For a complete and balanced statement of the evidence in the record, the Court is respectfully referred to the Statement of the Case in the opening brief for the defendant-appellant (pp. 3-18). In this reply brief we shall endeavor to correct the most important of the factual overstatements and omissions in the Government's brief.

The Government argues that a comparison of the photographs of Green in the photo spreads shown to trial witnesses (A775, A781) with the bank surveillance photographs (A772, A773, A774) "compels a conclusion" that Green is the man shown in the surveillance photographs (Gov't Br. 16 n.*), and makes numerous other references to the supposedly conclusive nature of the surveillance photographs (see, e.g., Gov't Br. 5, 6, 23, 25). In fact, as an examination of the photographs in the appendix will demonstrate, it is difficult to find any resemblance between the photographs of Green (or Green himself) and the surveillance photographs. This is confirmed beyond question by the fact - which the Government does not even mention - that the jury, after it retired, called for all of the surveillance

photographs (A742-A743), and then called for a magnifying glass to examine them (A755). We submit that in the present case, as in United States v. Robinson, Slip Opinion 5913, 5916 (2d Cir. Nov. 1, 1976), the Court will find that "comparison of appellant [Green's] photograph with those taken in the bank provokes appellate uncertainty as much as it provoked uncertainty in [the jury] . . . ."

The Government makes a number of references to the supposed strength of its case against Green (Gov't Br. 10-11, 12, 23-24). As shown in our opening brief (pp. 16-18, 41) the jury did not find the case against Green to be an open-and-shut one at all. The Government slides quickly over (Gov't Br. 22) the undisputed fact that there were glaring contradictions between the surveillance photographs and the descriptions of the robbers given by the bank witnesses (see our opening brief, pp. 33-34). Moreover, as shown in Points I and II of our opening brief (pp. 19-34), the basic constituents of the Government's case against Green - the gun, holster, and bullets and the identification testimony of the four bank witnesses - were themselves improperly admitted into evidence against Green.

Finally, the Government attempts to bolster its case against Green by repeated references to the asserted demand note which was allegedly taken from Mrs. Green after her arrest (Gov't Br. 10, 11, 23). In fact, as the Government brief admits (Gov't Br. 7), the District Court ruled

that the supposed demand note would not be received as evidence against Green (A641-A642). The Government presented no evidence to link the supposed demand note to Green. Under these circumstances, it is simply not open to the Government to contend on this appeal that Green's conviction should be sustained on the basis of evidence which was not permitted to go to the jury against Green.* Cf., e.g., United States v. San Juan, Slip Opinion 471, 480-484 (2d Cir. Nov. 10, 1976).

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* In a footnote at the outset of its brief (Gov't Br. 2 n.***), the Government refers to Green's conviction upon a plea of guilty to an unrelated indictment in the United States District Court for the District of New Jersey. This conviction has no relevance whatever to the issue whether Green received a fair trial on the issue of his guilt or innocence in the present case, and the Government does not contend otherwise. The fact that the Government felt compelled to thrust this unrelated and irrelevant conviction before the Court at the outset of its brief underscores the hollowness of the Government's contention that its case against Green on the present appeal is an overwhelming one.

POINT I

THE GUN, HOLSTER, AND BULLETS SEIZED FROM GREEN AT HIS ARREST WERE IMPROPERLY ADMITTED INTO EVIDENCE AGAINST HIM

We showed in Point I of our opening brief (pp. 19-23), citing the recent decision of this Court in United States v. Robinson, Slip Opinion 5913 (2d Cir. Nov. 1, 1976), that the gun, holster, and bullets seized from Green at his arrest should not have been admitted into evidence against him.

The Government places its primary reliance on this issue upon a lengthy argument that the Robinson case is inconsistent with prior decisions in this Circuit and was wrongly decided (Gov't Br. 9-10 & n.*). A reading of the cases cited by the Government makes it clear that the present case and the Robinson case are much stronger cases for exclusion than any of the prior decisions cited by the Government.* Accordingly, these prior decisions do not justify the admission of the gun, holster, and bullets into evidence against Green in the present case.

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* For example, in United States v. Campanile, 516 F.2d 288, 290 (2d Cir. 1975), which is extensively discussed by the Government (Gov't Br. 9-10 n.*), the defendant admitted that he had taken the handgun to Vermont to "line up robberies." Despite this fact, the Court stressed that "this evidence was on the borderline of admissibility in view of its tendency to create unfair prejudice. [Citation omitted.]" 516 F.2d at 292. Neither of the above facts is mentioned in the Government's discussion of Campanile.

In the alternative, the Government argues that the probative value of the gun, holster, and bullets in the present case was stronger, and their prejudicial impact weaker, than was the case in Robinson (Gov't Br. 10-12). This argument simply ignores the record in the present case.

In the present case, unlike Robinson, there was literally no evidence from which the jury could have concluded that the gun taken from Green resembled any gun used in the robberies with which Green was charged.* The prejudice from the admission of the gun, holster, and bullets was much stronger in the present case than in Robinson, not only because the District Court in the present case gave no limiting instructions on the use of this evidence (see A727), but also because the Government in its summation emphasized the alleged significance of this evidence (A684). The critically damaging nature of the gun, holster, and bullets is established beyond question by the fact that the jury specifically asked, after it retired, that it be sent not only the gun but also the holster and bullets (A749-A750) - a fact which is nowhere mentioned in the Government's brief and which has no parallel in the Robinson case.

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* The Government admits this fact (Gov't Br. 11), although it attempts unsuccessfully to discount its significance.

POINT II

THE PHOTO SPREADS SHOWN BEFORE THE TRIAL TO THE WITNESSES WHO IDENTIFIED GREEN AT THE TRIAL WERE SO UNNECESSARILY AND IMPERMISSIBLY SUGGESTIVE AS TO REQUIRE EXCLUSION OF THE IDENTIFICATIONS AT THE TRIAL

We showed in our opening brief (pp. 26-28) that the photo spreads shown to the witnesses who identified Green at the trial (A775-A776, A781) were unnecessarily and impermissibly suggestive because in each case the only photograph showing a man whose skull structure and features even arguably resembled those of the man in the bank surveillance photographs (A772, A773, A774) was a photograph of Green.

The Government does not deny the crucial fact that Green is the only individual shown in either of the critical photo spreads whose skull structure and features even arguably resembled those of the man shown in the surveillance photographs.* Instead, the Government argues that this fact is irrelevant, quoting the statement of the Court in United States v. Reid, 517 F.2d 953, 966 n.15 (2d Cir. 1975), that "there is no requirement that even in line-ups the accused

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* The Government does make generalized assertions that the photo spreads were "fair" (Gov't Br. 16 & n.*), but carefully refrains from disputing the fact that Green is the only individual shown in the critical photo spreads whose skull structure and features even arguably resembled those of the man shown in the surveillance photographs.

must be surrounded by persons nearly identical in appearance, however desirable that may be." (Gov't Br. 17.)

This argument is entirely beside the point. The vital unfairness of the critical photo spreads in the present case did not result solely from the fact that none of the other persons shown in the photo spreads had skull structures or features resembling Green's. The essential unfairness of the photo spreads resulted from the fact that the FBI had surveillance photographs showing the skull structure and features of the suspect, and made no effort whatever to see that either of the critical photo spreads contained a photograph of any person other than Green whose skull structure and features even arguably resembled those of the suspect.* As shown in our opening brief (pp. 25-26), this is precisely the kind of selective suggestiveness that this Court condemned in United States v. Fernandez, 456 F.2d 638, 641-42 (2d Cir. 1972), and Braithwaite v. Manson, 527 F.2d 363, 367 (2d Cir. 1975), cert. granted, 96 S. Ct. 1937 (1976).

The Government next argues that it could not have used photo spreads containing only photographs of individuals

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* The Government does not dispute the accuracy of the statement in our opening brief (p. 28) that the FBI agents who put together the two critical photo spreads simply started with a photograph of Green and added a number of other photographs of young black males, without making any attempt to choose photographs of individuals whose skull structure and features in any way resembled those of the man shown in the surveillance photographs.

whose skull structure and features resembled Green' because such photo spreads would themselves have been attacked as unduly suggestive (Gov't Br. 17-18). It is difficult to believe that this argument is meant to be taken seriously.* If it is, the obvious answer would be to include in the photo spreads some photographs of individuals not resembling the person shown in the surveillance photographs, but not to use such photographs exclusively. The one kind of photo spread which could not conceivably be used by any fair-minded person seeking to determine whether the witness could reliably identify the defendant is the kind of photo spread which was actually used in the present case.

The Government attempts in a lengthy footnote to explain away the fact that the photograph of Toby Raines was dropped from every subsequent photo spread, after he had been picked together with Green by one eyewitness, as a possible instance of lack of coordination within the FBI (Gov't Br. 15-16 n.*). Eight years after Simmons v. United States, 390

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* One is virtually forced to conclude that the real drawback of such a neutral photo spread from the FBI's point of view is that it substantially reduces the likelihood that the witness will pick the "right" suspect, as indeed the Government brief strongly implies (see Gov't Br. 17). It is difficult to find any other explanation for the FBI's failure, throughout the eight years following the decision of the Supreme Court in Simmons v. United States, 390 U.S. 377 (1968), to adopt procedures which would guarantee the use of fair and nonsuggestive photo spreads in cases such as the present case. Compare United States v. Reid, 517 F.2d 953, 966 (2d Cir. 1975).

U.S. 377 (1968), such lack of coordination (if it was lack of coordination) on the part of the FBI is completely inexcusable. Compare United States v. Reid, 517 F.2d 953, 966 (2d Cir. 1975). The prejudice to Green from the dropping of Raines' photograph was equally devastating whether Raines' photograph was dropped intentionally (as was clearly the case at least in the second photo spread shown to the witness who had picked out Raines) or through lack of coordination.

The Government makes at great length the familiar argument that, even assuming that the photo spreads were impermissibly suggestive, they were not, in the words of the Supreme Court in Simmons v. United States, 390 U.S. 377, 384 (1968), "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (Gov't Br. 19-24). For the most part the Government's argument simply repeats the Government's erroneous contention that its case against Green was overwhelming, which has already been answered above (see p. 3 supra). The Government also argues, however, that the bank witnesses had a lengthy opportunity to observe the robbers (Gov't Br. 20-22 & n.*). The Court is respectfully requested to compare the Government's selective summary of the record on this point with the complete facts summarized in our opening brief (pp. 6, 8, 9, 12), which establish that each of the witnesses had only a brief opportunity to observe the robbers.

POINT III

THE DISTRICT COURT SHOULD HAVE GRANTED GREEN'S MOTION FOR A JUDGMENT OF ACQUITTAL ON COUNT THREE OF THE INDICTMENT

The Government does not deny that, aside from a single surveillance photograph (A772), no evidence of any kind even arguably placed Green in or near the First National City Bank branch at 40 West 57th Street at the time of the attempted robbery on March 5, 1976 (Gov't Br. 24-26). The Government nevertheless contends that there was sufficient evidence to support a conviction of Green on Count Three of the indictment. Particularly in view of the highly uncertain resemblance between Green and the surveillance photograph (see pp. 2-3 supra), we submit that the Court should find otherwise.

POINT IV

CHARGES RELATING TO THREE SEPARATE ROBBERIES OR ATTEMPTED ROBBERIES WERE IMPROPERLY JOINED IN ONE INDICTMENT

The Government's brief does not attempt to controvert the showing in our opening brief (p. 40) that the proof relating to the three robberies or attempted robberies joined in the superseding indictment in the present case was entirely separate and distinct, so that the joinder could not be justified by any considerations of trial economy. Moreover, the Government has been unable to cite any decision of this Court in support of its contention that these three robberies or attempted robberies could properly be joined under Rule 8(b) of the Federal Rules of Criminal Procedure (see Gov't Br. 27).*

The Government argues that Green was not prejudiced by the joinder of counts relating to three separate robberies or attempted robberies in a single indictment because, the Government argues, it could have elected to try Green separately from Mrs. Green on counts relating to all three robberies or

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* The only decision of this Court cited by the Government on this point (Gov't Br. 27) is United States v. Di Giovanni, Slip Opinion 437, 440 (2d Cir. Nov. 9, 1976), which dealt solely with joinder under Rule 8(a) of the Federal Rules of Criminal Procedure, and did not deal in any way with the stricter standards of Rule 8(b). The decisions from other courts cited by the Government on this point (Gov't Br. 27) likewise fail to support the Government's position, because they all concerned crimes committed at one and the same location at different times.

attempted robberies (Gov't Br. 27, 29). In this event, however, evidence relating solely to Mrs. Green (such as the alleged demand note) would not have been before the jury at all. Thus, despite the Government's argument, it is clear that Green was prejudiced by the joinder.

The Government also argues that even if it had proceeded to trial on the original indictment relating solely to the attempted robbery of the Manufacturers Hanover Trust Company branch at 1185 Avenue of the Americas on February 25, 1976, it could have introduced evidence of the other robberies or attempted robberies, either as similar acts or as evidence of a conspiracy which was not charged in the indictment (Gov't Br. 28-29 n.**, 29 n.*). But the Government studiously avoided reliance upon either of these questionable propositions at the trial, acquiescing instead in the District Court's direction to the jury to consider the evidence relating to each of the three robberies or attempted robberies separately (A740). Having eschewed reliance upon a conspiracy or similar act theory at the trial, the Government may not now attempt to sustain the judgment by espousing such a theory upon appeal. Cf., e.g., United States v. San Juan, Slip Opinion 471, 480-484 (2d Cir. Nov. 10, 1976).

CONCLUSION

For the reasons given above and in the Brief for Defendant-Appellant, the judgment of conviction entered against defendant-appellant James Melvin Green by the United States District Court for the Southern District of New York on September 14, 1976 should be reversed, and the case should be remanded with directions to dismiss Count Three of the indictment and to sever Counts One and Two from Counts Four and Five of the indictment against defendant-appellant James Melvin Green.

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December 30, 1976

Respectfully submitted,

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